Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-38–08 OF 2022(W)

TENGKU MAIMUN CHIEF JUSTICE, NALLINI PATHMANATHAN, VERNON ONG, ZABARIAH YUSOF AND MOHAMAD ZABIDIN FCJJ

31 MAY 2023

Constitutional Law — Legislation — Constitutionality — Section 4C of Income Tax Act 1967 ('the ITA') — Compensation for acquisition of appellant's lands was subjected to tax under ss 4C and 24(1)(aa) of ITA — Whether s 4C of ITA was in contravention with art 13(2) of Federal Constitution as it deprived appellant of adequate compensation granted in accordance with Land Acquisition Act 1960 — Income Tax Act 1967 s 4C — Federal Constitution art 13

This was an appeal by the appellant against the decision of the Court of Appeal in affirming the decision of the High Court. The High Court had dismissed the appellant's application for judicial review to quash the notice of assessment for Year Assessment 2018 issued by the respondent. The appellant owned four parcels of lands ('the lands'). Sometime in 2017, the lands were compulsorily acquired by the State Government of Selangor for the project of SUKE Highway. After the appellant received the amount of compensation, the respondent requested the appellant to furnish, among others, a complete statement of account for year-end 2014 until 2018, a complete tax calculation for the same period, the compensation offered for the acquisition of the lands in Form H, and the amount of compensation received. The appellant furnished all the documents as requested. Thereafter, the respondent informed the appellant that the compensation for the acquisition of the lands was subjected to tax under ss 4C and 24(1)(aa) of the Income Tax Act 1967 ('the ITA') and the respondent issued to the appellant a notice of assessment for Year Assessment 2018 for the amount of RM52,966,517.27. Aggrieved by the decision of the respondent, the appellant filed an application for judicial review in the High Court but was dismissed. Dissatisfied, the appellant appealed to the Court of Appeal but was also dismissed. Hence, this appeal. Leave was granted to the appellant to appeal on the question of law, inter alia, of whether s 4C of the ITA was in contravention with art 13(2) of the Federal Constitution ('FC') as it deprived the appellant of adequate compensation granted in accordance with the Land Acquisition Act 1960. It was argued by the appellant that ss 4C and 24(1)(aa) of the ITA purported to take away the safeguard of 'adequate compensation' as protected under art 13(2) of the FC as it had the effect of reducing the compensation paid to the taxpayer.

Held, allowing the appeal:

(1) It was an established principle of law that the adequate compensation placed the landowner in the original position as if the land had not been acquired, by referring to the market value of the land. Section 4C of the ITA considered compensation from compulsory acquisition to be a form of profit or gain and was therefore fundamentally flawed in providing that a business's profits or gains included compensation from compulsory acquisition, as an adequate compensation had no element of profit or gain, nor any pecuniary advantage. As such, s 4C of the ITA infringed on the landowner's right to adequate compensation under art 13(2) of the FC. Section 4C of the ITA had taken away the safeguard of adequate compensation as guaranteed under art 13(2) of the FC and that it had the effect of reducing the compensation paid to the landowner/taxpayer such that the landowner/taxpayer would no longer be receiving adequate compensation under art 13(2) of the FC. Finally, para 3 of Schedule 2 of the Real Property Gains Tax Act 1976 clearly stipulated that a transaction involving the disposal of an asset as a result of compulsory acquisition was a transaction where the disposal price was deemed to be equal to its acquisition price. When the disposal price was deemed the same as the acquisition price, the transaction yielded a nil-tax effect. The question of law was therefore answered in the affirmative and s 4C of the ITA was thus unconstitutional and liable to be struck down (see paras 42–43, 46–47 & 51–54).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Rayuan dalam mengesahkan keputusan Mahkamah Tinggi. Mahkamah Tinggi telah menolak permohonan perayu untuk semakan kehakiman untuk membatalkan notis taksiran bagi Tahun Taksiran 2018 yang dikeluarkan oleh responden. Perayu memiliki empat petak tanah ('tanah'). Pada tahun 2017, tanah-tanah tersebut telah diambil secara wajib oleh Kerajaan Negeri Selangor untuk projek Lebuhraya SUKE. Selepas perayu menerima amaun pampasan, responden meminta perayu mengemukakan, antara lain, penyata akaun lengkap untuk akhir tahun 2014 hingga 2018, pengiraan cukai lengkap untuk tempoh yang sama, pampasan yang ditawarkan untuk pengambilan tanah dalam Borang H, dan jumlah pampasan yang diterima. Perayu memberikan semua dokumen seperti yang diminta. Selepas itu, responden memaklumkan kepada perayu bahawa pampasan bagi pengambilan tanah-tanah tersebut adalah tertakluk kepada cukai di bawah ss 4C dan 24(1)(aa) Akta Cukai Pendapatan 1967 ('ACP') dan responden mengeluarkan kepada perayu satu notis taksiran bagi Tahun Taksiran 2018 sebanyak RM52,966,517.27. Terkilan dengan keputusan responden, perayu memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi tetapi ditolak. Tidak berpuas hati, perayu merayu kepada Mahkamah Rayuan tetapi juga ditolak. Oleh itu, rayuan ini.

Kebenaran telah diberikan kepada perayu untuk merayu atas persoalan undang-undang, antara lain, sama ada s 4C ACP bercanggah dengan perkara 13(2) Perlembagaan Persekutuan ('PP') kerana ia mengurangkan pampasan yang memadai bagi perayu yang diberikan mengikut Akta Pengambilan Tanah 1960. Telah dihujahkan oleh perayu bahawa ss 4C dan 24(1)(aa) ACP dikatakan menghapuskan perlindungan 'pampasan yang memadai' seperti yang dilindungi di bawah perkara 13(2) PP kerana ia mempunyai kesan mengurangkan pampasan yang dibayar kepada pembayar cukai.

Diputuskan, membenarkan rayuan:

(1) Adalah menjadi prinsip undang-undang bahawa pampasan yang memadai meletakkan pemilik tanah pada kedudukan asal seolah-olah tanah itu belum diambil, dengan merujuk kepada nilai pasaran tanah itu. Seksyen 4C ACP menganggap pampasan daripada pengambilan wajib sebagai satu bentuk faedah atau keuntungan dan oleh itu pada asasnya adalah cacat dalam memperuntukkan bahawa faedah atau keuntungan perniagaan termasuk pampasan daripada pengambilan wajib, kerana pampasan yang memadai tidak mempunyai unsur faedah atau keuntungan, atau sebarang kelebihan kewangan. Oleh itu, s 4C ACP telah melanggar hak pemilik tanah untuk mendapatkan pampasan yang memadai di bawah perkara 13(2) PP. Seksyen 4C ACP telah menghapuskan perlindungan pampasan yang memadai seperti yang dijamin di bawah perkara 13(2) PP dan bahawa ia mempunyai kesan mengurangkan pampasan yang dibayar kepada pemilik tanah/pembayar cukai supaya pemilik tanah/pembayar cukai tidak lagi menerima pampasan yang mencukupi di bawah perkara 13(2) PP. Akhir sekali, perenggan 3 Jadual 2 Akta Cukai Keuntungan Harta Tanah 1976 dengan jelas menyatakan bahawa transaksi yang melibatkan pelupusan aset hasil daripada pengambilan wajib adalah transaksi di mana harga pelupusan dianggap sama dengan harga pengambilannya. Apabila harga pelupusan dianggap sama dengan harga pengambilan, urus niaga tersebut menghasilkan kesan tiada cukai. Oleh itu, persoalan undang-undang telah dijawab secara afirmatif dan s 4C ACP adalah tidak berperlembagaan dan boleh dibatalkan (lihat perenggan 42–43, 46–47 & 51–54).]

Cases referred to

Commissioner of Taxes v CW (Pvt) Ltd [1990] LRC (Const) 544, HC (refd)
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 All ER 846, PC (refd)
Horn v Sunderland Corporation [1941] 2 KB 26, CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597, CA (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713, SC (refd)
NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia [2005] 6 MLJ 65, HC (refd)
Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
State of West Bengal v Mrs Bela Banerjee and others 1954 AIR 170, SC (refd)
Station Hotels Berhad v Malayan Railway Administration [1977] 1 MLJ 112, FC (refd)
Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2019] 1 MLJ 1; [2019] 1 CLJ 42, FC (refd)

Legislation referred to

Federal Constitution arts 4(1), 13, 13(1), (2), 96
Finance Act 2014
Income Tax Act 1967 ss 4(a), 4C, 24, 24(1)(aa), 99, 99(1)
Land Acquisition Act 1960 s 38(5), Form H
Real Property Gains Tax Act 1976 Schedule 2, para 3, 3(f)

Appeal from: *Wiramuda (M) Sdn Bhd v Director-General of the Inland Revenue* [2022] 5 MLJ 414 (Court of Appeal, Putrajaya)

DP Naban (with S Saravana Kumar, Fiona Bodipalar, Yap Wen Hui, Pan Shan Ping and Alan Ng) (Bodipalar Ponnudurai De Silva) for the appellant.
Hazlina bt Hussain (with Ahmad Isyak bin Mohd Hassan, Mohd Harris Hanapi and Mohamad Asyraf Zakaria) (Inland Revenue Board of Malaysia) for the respondent.

Mohamad Zabidin FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by Wiramuda (M) Sdn Bhd ('the appellant') against the decision of the Court of Appeal on 7 March 2022 affirming the decision of the High Court. The High Court had dismissed the appellant's application for judicial review to quash the notice of assessment for Year Assessment 2018 dated 31 May 2019 issued by the Director General of the Inland Revenue ('the respondent').

[2] Leave was granted by this court to the appellant to appeal on the following seven questions of law:

(i) whether s 4C and s 24(1)(aa) of the Income Tax Act 1967 ('the ITA 1967') which were enacted through the Finance Act 2014 are

A unconstitutional, null, void and of no legal effect on the ground that it contravenes art 13(2) of the Federal Constitution?

(ii) whether s 4C of the ITA 1967 is in contravention with art 13(2) of the Federal Constitution as it deprives the appellant of adequate compensation granted in accordance with the Land Acquisition Act 1960 ('the LAA 1960')?

(iii) whether art 4(1) of the Federal Constitution is applicable in light of s 4C of the ITA 1967 being inconsistent with art 13(2) of the Federal Constitution?

(iv) whether the presumption of the constitutionality of s 4C of the ITA 1967 is a rebuttable presumption?

(v) whether the appellant's land (which was compulsorily acquired under the LAA 1960) was held as stock in trade or as fixed asset is an irrelevant fact to determine the constitutionality of s 4C and s 24(1)(aa) of the ITA 1967?

(vi) whether by reason of the fact the applicant's land had been consistently held and described as fixed asset in its audited accounts (with no other contrary evidence to suggest otherwise) proves this fact and discharges the burden of proof that the appellant's land is a fixed asset? and

(vii) whether an award of compensation arising from compulsory land acquisition should be subject to real property gains tax under the Real Property Gains Tax Act 1976 ('the RPGTA 1976'), instead of income tax under s 4C of the ITA 1967?

[3] On 9 December 2022, after hearing submissions of both sides, we unanimously allowed the appeal by answering question (ii) in the affirmative. The appellant at the outset had withdrawn questions (vi) and (vii) and we found no necessity to answer the rest of the questions posed.

BACKGROUND FACTS

[4] Briefly, the relevant facts are as follows.

[5] The appellant owned four parcels of lands, namely HS(D) 25128, PT25163 ('25163') HS(D) 25129, PT25164 ('25164') HS(D) 25130, PT25165 ('25165') and HS(D) 25132, PT25167 ('25167') (collectively referred to as the lands).

[6] At some point of time, the appellant had carried out quarrying activities on certain parts of the lands where the appellant received income from the sale of quarry rocks. The quarry activities ended in 2011 and the lands remained dormant since then.

[7] Sometime in 2017, the lands were compulsorily acquired by the State Government of Selangor for the project of SUKE Highway. The amount of compensation awarded by the land administrator for the acquisition was objected to by the appellant. The objection was referred to the High Court under s 38(5) of the LAA 1960. No further issue arose out of the amount of compensation awarded by the High Court.

[8] Nonetheless, after the appellant received the amount of compensation, vide a letter dated 12 February 2019 the respondent requested the appellant to furnish, among others, a complete statement of account for Year-End 2014 until 2018, a complete tax calculation for the same period, the compensation offered for the acquisition of the lands in Form H, and the amount of compensation received. The appellant furnished all the documents as requested.

[9] Thereafter, the respondent vide a letter dated 28 February 2019 informed the appellant that the compensation for the acquisition of the lands was subject to tax under ss 4C and 24(1)(aa) of the ITA 1967.

[10] After various meetings and correspondences, the respondent issued to the appellant a notice of assessment for Year Assessment 2018 dated 31 May 2019 for the amount of RM52,966,517.27.

PROCEEDINGS IN THE HIGH COURT

[11] Aggrieved by the decision of the respondent, the appellant filed an application for judicial review in the High Court seeking for, inter alia, the following reliefs:

(a) an order for certiorari to quash the respondent's decision in the form of the notice of assessment for Year Assessment 2018 dated 31 May 2019 on the grounds that the said decision of the respondent in this respect was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the appellant's legitimate expectations as s 4C of the ITA 1967 is not applicable;

(b) a declaration that the sum amounting to RM202,552,569.50 received by the appellant for the alleged compulsory acquisition of its parcels of land is not compensation under s 4C of the ITA 1967 even if the said section is valid in law;

(c) a declaration that s 4C of the ITA 1967 is unconstitutional and liable to be struck down on the ground that it purports to take away a person's right to receiving adequate compensation for the compulsory acquisition of land guaranteed by art 13(2) of the Federal Constitution; and

(d) a declaration that the lands acquired by the State Authority were not the appellant's stock in trade and thus is subject to real property gains tax, whereby under para 3(f) of Schedule 2 of the Real Property Gains Tax Act 1976 ('the RPGTA 1976') the disposal price is deemed equal to the acquisition price and there is accordingly no gains in respect of which real property gains tax may be charged.

[12] The issue to be determined by the High Court was whether the respondent may impose tax on the compensation received by the appellant for the acquisition of the lands under the LAA 1960.

[13] Essentially, the learned High Court judge made the following findings:

(a) that ss 4C and 24 of the ITA 1967 empowers the respondent to impose tax on the compensation for the compulsory acquisition of the lands which are stock in trade;

(b) that ss 4C and 24 of the ITA 1967 were valid and not inconsistent with the FC while art 96 of the FC allows the respondent to impose tax on the appellant through the law;

(c) the appellant was compensated for the acquisition, and whether there was adequate compensation under art 13, Federal Constitution was an issue between the land administrator and the appellant, and not in relation to the respondent; and

(d) the appellant's challenge to the notice of assessment for Year Assessment 2018 involved question of facts which should be dealt with by the Special Commissioners of the Income Tax ('SCIT'), and that the appellant should have filed its appeal to the SCIT under s 99 of the ITA 1967.

[14] Since the appellant failed to prove that the respondent's decision was tainted with illegality, irrationality, procedural impropriety and/or disproportionality, the learned High Court dismissed the appellant's application for judicial review.

PROCEEDINGS IN THE COURT OF APPEAL

[15] Dissatisfied, the appellant appealed to the Court of Appeal. The core issues for the determination of the Court of Appeal were:

(a) whether s 4C of the ITA 1967 is unconstitutional for contravention of art 13(2) of the Federal Constitution;

(b) whether the appellant can bypass the alternative remedy of appeal to the SCIT under s 99(1) of the ITA 1967; and

(c) whether the appellant's lands compulsorily acquired are stock in trade as envisaged under ss 4C and 24(1)(aa) of the ITA 1967.

[16] The Court of Appeal held that s 4C of the ITA 1967 is constitutional on the ground that the appellant was not deprived of its right to adequate compensation for the compulsory acquisition of the lands and that the appellant has the right to object to the amount of compensation by way of land reference to the High Court which was done in the present case.

[17] In respect of the alternative remedy under s 99(1) of the ITA 1967, the Court of Appeal was of the view that it is trite that where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances. It was held that there was no special or exceptional circumstance that entitled the appellant to bypass the alternative remedy under s 99(1) of the ITA 1967.

[18] On the issue of whether the lands are stock in trade, the Court of Appeal held that it is a question of fact which should be determined by the SCIT and not the High Court in an application for judicial review.

[19] Consequently, the Court of Appeal unanimously dismissed the appellant's appeal and affirmed the decision of the High Court.

PROCEEDINGS IN THE FEDERAL COURT

The appellant's submission

[20] The appellant placed reliance on the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (FC) to argue that 'adequate compensation' as envisaged in art 13(2) of the Federal Constitution is the sum that would place the taxpayer in the same financial position as he would have been if there was no question of the subject land being compulsorily acquired.

[21] Learned counsel also referred to the case of *Station Hotels Berhad v Malayan Railway Administration* [1977] 1 MLJ 112 (FC) to submit that the right to adequate compensation for compulsory acquisition is fundamental in nature and must be preserved by the courts of law. And that, this fundamental nature has been recognised in the case of *Tenaga Nasional Bhd v Bukit Lenang*

Development Sdn Bhd [2019] 1 MLJ 1; [2019] 1 CLJ 42 (FC).

[22] It was argued by the appellant that ss 4C and 24(1)(aa) of the ITA 1967 purport to take away the safeguard of 'adequate compensation' as protected under art 13(2) of the Federal Constitution. It was further argued that both the said sections have the effect of reducing the compensation paid to the taxpayer, and thus the taxpayer would not be paid 'adequate compensation' as required under art 13(2) of the Federal Constitution.

[23] In this respect, learned counsel cited a case decided by the Supreme Court of Zimbabwe in *Commissioner of Taxes v CW (Pvt) Ltd* [1990] LRC (Const) 544, where it was ruled that the provision of taxing the compensation arising from the compulsory acquisition is unconstitutional.

[24] Learned counsel contended that in taxing the compensation received from the compulsory acquisition, ss 4C and 24(1)(aa) of the ITA 1967 are unconstitutional as being inconsistent with art 13(2) of the Federal Constitution.

[25] Learned counsel went on to submit that art 13(2) of the Federal Constitution places a restriction on the powers of Parliament to pass a law providing for compulsory acquisition or use of property without providing adequate compensation; and that the doctrine of basic structure of the Constitution would be defeated if it was ruled that Parliament may enact laws which erode the fundamental rights guaranteed under art 13(2) of the Federal Constitution. Thus, it was submitted that ss 4C and 24(1)(aa) of the ITA 1967 violate the doctrine of basic structure of the Federal Constitution.

[26] In light of the foregoing, learned counsel submitted that ss 4C and 24(1)(aa) of the ITA 1967 which seek to impose tax on compensation for compulsory acquisition should be declared void and unconstitutional as being inconsistent with art 13(2) of the Federal Constitution.

The respondent's submission

[27] In gist, learned counsel for the respondent submitted that the taxing of the compensation received by the appellant from the compulsory acquisition under s 4C of the ITA 1967 is in line with art 96 of the Constitution and does not contravene art 13(2) of the Constitution.

[28] It was argued that the introduction of ss 4C and 24(1)(aa) of the ITA 1967 is intended to empower the respondent to impose tax on the compensation received from the compulsory acquisition of land by the Government under the LAA 1960 on condition that such land is a stock in

trade, where the profit from the disposal will be taxed as a business income.

[29] Accordingly, learned counsel submitted that s 4C read together with s 4(a) of the ITA 1967 makes the compensation received from the compulsory acquisition as a business income which is taxable under s 4(a) of the ITA 1967.

[30] It was further submitted that the appellant as a developer had in fact classified the asset as its current asset which is the appellant's stock in trade, and therefore the compensation for the compulsory acquisition falls within the ambit of s 4C of the ITA 1967.

[31] Learned counsel also contended that the present case involves factual issues, in particular, whether the disposal of land is a stock in trade which require the examination of relevant documents and testimony of witnesses through a trial before the SCIT. Further, as the appellant has been adequately compensated, art 13(2) of the Federal Constitution is irrelevant.

OUR DECISION

[32] As mentioned at the outset, we unanimously allowed the appeal by answering question (ii) in the affirmative. In the circumstances, in this judgment, we will only focus our discussion and analysis on question (ii). For convenience, question (ii) is reproduced:

> Whether section 4C of the ITA 1967 is in contravention with Article 13(2) of the Constitution as it deprives the appellant of adequate compensation granted in accordance with the LAA 1960.

[33] Pursuant to s 4C of the ITA 1967, compensation on account of compulsory acquisition (amount receivable arising from stock in trade parted by compulsory acquisition) is considered as business income, and it is chargeable for income tax under s 4(a) of the ITA 1967. Section 4C of the ITA 1967 reads as follows:

> 4C Gains or profits from a business arising from stock in trade parted with by any element of compulsion
>
> For the purpose of paragraph 4(a), gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner.

[34] Whereas, s 24(1)(aa) of the ITA 1967 provides for taxing the compensation receivable in the relevant basis period as follows:

> 24 Basis period to which gross income from a business is related
>
> (1) Where in the relevant period a debt owing to the relevant person arises in respect

A of —

(a) any stock in trade sold in or before the relevant period in the course of carrying on a business;

(aa) *any stock in trade parted with by any element of compulsion including on* B *requisition or compulsory acquisition or in a similar manner, in or before the relevant period*;

(b) any services rendered or to be rendered at any time in the course of carrying on a business; or

C (c) the use or enjoyment of any property dealt or to be dealt with at any time in the course of carrying on a business,

the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period. (Emphasis added.)

D **[35]** Sections 4C and 24(1)(aa) of the ITA 1967 were introduced via cll 5 and 9 respectively of the Finance Bill (No 2) 2013 on 1 October 2013. The intention of Parliament to tax the compensation received from compulsory acquisition is seen in the Explanatory Statement to the Bill as follows:

E Clause 5 seeks to introduce a new section 4C into Act 53 to clarify that any amount receivable by a person from the disposal of its stock in trade by any element of compulsion such as compulsory acquisition or forced sale is treated as gains or profits from a business ... This amendment has effect for the year of assessment 2014 and subsequent years of assessment.

F **[36]** Clearly, s 4C of the ITA 1967 was introduced to subject the compensation received for the compulsory acquisition of land on the premise that the compensation is gain or profit from business.

G **[37]** The issue for our consideration was rather straight forward. It was whether s 4C of the ITA 1967 contravenes art 13 of the Federal Constitution.

[38] Article 13(1) of the Federal Constitution provides 'No person shall be deprived of property save in accordance with law', while art 13(2) states 'No H law shall provide for the compulsory acquisition or use of property without adequate compensation'.

[39] The appellant argued that adequate compensation under art 13(2) of the Constitution means that the sum would place the taxpayer in the same I financial position as he would have been if there was no question of the subject land being compulsorily acquired. In particular, reference was made to *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (FC) ('Semenyih Jaya') where this court stated as follows:

The term 'adequate compensation' is not defined in the Act (Land Acquisition Act 1960). In *Pentadbir Tanah Daerah Gombak v Huang Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ 282, the Supreme Court held that the basic principle governing compensation is that the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired (see Compulsory Acquisition and Compensation by Sir Frederick Corfield QC and RJA Carnwarth).

The above principle is known as the principle of equivalence. By this principle, the affected land owners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land.

[40] The following cases from the Commonwealth jurisdiction were also cited on the principle of equivalence:

(a) *Horn v Sunderland Corporation* [1941] 2 KB 26;

(b) *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846;

(c) *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495; and

(d) *State of West Bengal v Mrs Bela Banerjee and others* 1954 AIR 170.

[41] Given that the issue before us was not so much on whether the appellant has been awarded adequate compensation under art 13(2) for the lands compulsorily acquired but whether s 4C of the ITA 1967 contravenes art 13, we do not think that we need to deliberate much on the principles of adequate compensation and equivalence.

[42] Suffice for us to state that it is an established principle of law that the adequate compensation places the landowner in the original position as if the land has not been acquired, by referring to the market value of the land. And what amounts to market value is settled by a host of authorities.

[43] Reverting to s 4C of the ITA 1967 it states that gains or profits from a business include compensation on account of compulsory acquisition (amounts receivable arising from stock in trade parted with by compulsory acquisition). This means that s 4C of the ITA 1967 considers compensation from compulsory acquisition to be a form of profit or gain.

[44] The definition of profit was mentioned in the case of *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia* [2005] 6 MLJ 65 (HC):

[31] 'Profit' was defined in *Waldron v MG Securities* [1975] VR 508 at p 529 as:

One of the definitions of 'profit' given in the Oxford English Dictionary is 'that which is derived from or produced by some source of revenue'. Webster defines

A it as 'the income of invested property — it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business', and Dr Johnson defines it as 'Gain — pecuniary advantage'. It is in this sense that the word should be construed in this definition. (See also: *Maunder-Hartigon v Hamiton* [1984] 2 ACLC 438 at p 447).

B ...

[36] In *Maunder-Hartigon v Hamilton* [1984] 2 ACLC 438 at p 447) it was said that profit has been considered by Pape J in *Waldron v MG Securities* as being 'the income of invested property — it includes any benefit or advantage accruing from the management, use or sale of property or from the conduct of business or as 'gain' — pecuniary advantages.

C

[45] Clearly, profit and compensation have different meanings. Profit or gain in its simplest sense mean that there is a pecuniary advantage. As stated in *Semenyih Jaya*, adequate compensation means that there is no more or no less than the loss resulting from the compulsory acquisition of the land and so it places a landowner in the same financial position as he would have been in had his land not been compulsorily acquired. Simply put, the landowner earns no profit from the adequate compensation.

D

E

[46] Section 4C of the ITA 1967 is therefore fundamentally flawed in providing that a business's profits or gains include compensation from compulsory acquisition, as an adequate compensation has no element of profit or gain, nor any pecuniary advantage. At the risk of repetition, the landowner whose land was compulsorily acquired was merely placed in a situation had the land not been acquired.

F

[47] Since the landowner in receiving compensation is put back in his original position, and gains no earning or pecuniary advantage, charging income tax on the compensation received will mean that the landowner has not in fact received adequate compensation for the land acquired. As such, it was our view that s 4C of the ITA 1967 infringes on the landowner's right to adequate compensation under art 13(2) of the Federal Constitution.

G

H **[48]** At this juncture, we refer to *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597 (CA) ('Penang Realty') and *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 (SC) ('Lower Perak'). In these two cases, it was held that compulsory acquisition of land could not constitute a sale as the element of compulsion has vitiated the intention to trade, and thus compensation received from compulsory acquisition should not be subject to income tax.

I

[49] *Penang Realty* and *Lower Perak* were of course decided prior to the

introduction of ss 4C and 24(1)(aa) of the ITA 1967. As stated by learned counsel for the respondent in her written submission, prior to the enactment of ss 4C and 24(1)(aa) of the ITA 1967, the tax treatment under the ITA 1967 is to tax the compensation received on account of the compulsory acquisition of a property. With the decisions in *Penang Realty* and *Lower Perak*, the respondent saw the need to introduce ss 4C and 24(1)(aa), in particular, to treat compensation as profit or gain from business income to justify the imposition of tax.

[50] The fact however remains that the adequate compensation awarded to a landowner for a land compulsorily acquired has no element of profit or gain. By equating the adequate compensation awarded to such landowner as a gain for 'the disposal of a stock in trade', it runs contrary to the spirit of art 13 which guarantees the right to property and the right to an adequate compensation for the deprivation of the property. In other words, s 4C of the ITA 1967 has rendered art 13 illusory because having received what amounts to an adequate compensation under art 13, the landowner now has to pay tax under s 4C of the ITA 1967 for the compensation received. This effectively has resulted in the landowner getting less of the compensation and this amounts to an infringement of art 13 of the Federal Constitution.

[51] Thus, we agreed with the appellant that s 4C has taken away the safeguard of adequate compensation as guaranteed under art 13(2) of the Federal Constitution and that it has the effect of reducing the compensation paid to the landowner/taxpayer such that the landowner/taxpayer would no longer be receiving adequate compensation under art 13(2) of the Federal Constitution.

[52] Finally, we find it useful to refer to para 3 of Schedule 2 of the Real Property Gains Tax Act 1976 which states:

> 3 Transactions in which disposal price is deemed equal to acquisition price
>
> (1) In the following cases the disposal price shall be deemed to be equal to the acquisition price, that is to say —
>
> ...
>
> (f) the disposal of an asset as a result of a compulsory acquisition under any law;

[53] The above provision clearly stipulates that a transaction involving the disposal of an asset as a result of compulsory acquisition is a transaction where the disposal price is deemed to be equal to its acquisition price. When the disposal price is deemed the same as the acquisition price, the transaction yields a nil-tax effect. Although the above provision relates to a different legislation, it

supports the proposition that in a situation of a land being compulsorily acquired, there is no gain and no loss transaction and there is no profit that has been earned.

CONCLUSION

[54] For the reasons stated above, we answered question 2 in the affirmative, ie that s 4C of the ITA 1967 is in contravention of art 13(2) of the Federal Constitution as it deprives the appellant of the adequate compensation awarded in accordance with the LAA 1960. Section 4C is thus unconstitutional and liable to be struck down. The appeal was accordingly allowed with no order as to costs. The orders of the courts below were set aside.

Appeal allowed.

Reported by Ahmad Ismail